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No. 837

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1965

PARNELL BOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Rules	3
Statement of Case	3
Argument—	
1. Allegations in the affidavit for the search warrant were knowingly, falsely and fraudulently made by affiant, and were of such material relevancy as to destroy the integrity of the affidavit, rendering inadmissible into evidence property seized	7
2. The affidavit for a search warrant did not state sufficient facts to establish probable cause for the issuance of the search warrant	15
3. The search warrant did not sufficiently describe and identify the property to be seized, and did not state the grounds or probable cause for its issuance	21
4. The property introduced into evidence was illegally seized and taken from the home of petitioner without a search warrant	25
5. The validity of the affidavit and search warrant should be determined by Kentucky law	26
Conclusion	33
Appendix A — Constitutional Provisions, Statutes and Rules	1A
Appendix B — Opinion Below	3A
Appendix C — Judgment	15A

Page

Appendix D — Order Denying Petition for Rehearing 16A

Appendix E — Affidavit for Search Warrant 17A

Search Warrant 19A

Motion to Suppress Evidence 20A

CITATIONS

Cases:

Aguilar v. Texas, 378 U.S. 109 .....15, 19, 31
Commonwealth v. Davenport, 366 S.W.2d 171 .....15, 28
Draper v. U. S., 358 U.S. 307, 310 note 3, 3 L.ed.2d 327, 330, 79 S. Ct. 329 25
Elkins v. U. S., 364 U.S. 206 26
Feldman v. U. S., 322 U.S. 487 32
Giordenello v. U. S., 357 U.S. 480 .....15, 16
Go-Bart Importing Co. v. U. S., 282 U.S. 344 24
Jones v. U. S., 362 U.S. 257 .....15, 20
Ker v. California, 374 U.S. 23 31
King v. U. S., 282 F.2d 398, note 4, page 400 13
Malloy v. Hogan, 378 U.S. 1 31
Marron v. U. S., 275 U.S. 192 24
Messer v. Commonwealth, 350 S.W.2d 486 .....15, 28-29
Murphy v. Waterfront Commission, 378 U.S. 52 ....31, 32
Nathanson v. U. S., 290 U.S. 41 15
Rios v. U. S., 364 U.S. 253 26
Rugendorf v. United States, 376 U.S. 528 .....8, 13
Schoeneman v. U. S., 317 F.2d 173 15
Smith v. Commonwealth, 276 S.W. 495, 496 30
Stanford v. Texas, 379 U.S. 476 24
Staton v. Commonwealth, 240 S.W.2d 630 30
U. S. v. Murdock, 284 U.S. 141 32
U. S. v. Ventresca, 380 U.S. 102 15
United States v. Walker (CA 7, Ill.), 246 F.2d 519, 526 25
Wong Sun v. U. S., 378 U.S. 471 25

Constitutional Provisions, Statutes and Rules:

Fourth Amendment, U. S. Constitution ...7, 14, 24, 30, 31
Rule 41, Rules of Criminal Procedure 21, 24, 25
Rule 52(b), Fed. Rules of Procedure 8
Title 28, U.S.C. § 1254(l) 2
Title 18, U.S.C. § 641 3
Section 10, Constitution of Kentucky 14, 27, 30, 31, 33

Miscellaneous:

Headnote 1 in 9 L.ed.2d, at bottom of page 449 citing cases 25

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PARNELL BOWLING, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on September 29, 1965.

OPINION BELOW

The opinion of the court below (Appendix B, *infra*, pp. 3A-14A) is reported at 351 F.2d 236. No written opinion was rendered by the District Court.

JURISDICTION

The judgment of the court below (Appendix C, *infra*, page 15A) was entered on September 29, 1965. A timely

petition for rehearing was denied on November 3, 1965 (Appendix D, *infra*, p. 16A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where an affiant, for the purpose of securing a search warrant, knowingly states in his affidavit false allegations of material relevancy to the showing of probable cause, does the lack of integrity of such an affidavit destroy probable cause for the issuance of the search warrant, rendering inadmissible into evidence property seized thereunder?

2. Did the affidavit for a search warrant state sufficient facts to establish probable cause for the issuance of the search warrant?

3. Did the search warrant sufficiently describe and identify the property to be seized, and did it state the grounds or probable cause for its issuance?

4. Does a search warrant executed on one day, which execution is recorded on the face of the warrant, sustain a search and seizure at the same premises the next day? Is the search and seizure the next day a search and seizure without a warrant?

5. Where evidence is seized by state officers under an affidavit and search warrant issued by state authority, which evidence would be inadmissible in a state court proceeding because of the invalidity of both the affidavit and the search warrant under the state's constitution, is such seized evidence admissible in a federal criminal proceeding under the Fourth Amendment where the investigation of the case and the fruits of the search and seizure were handed over by the state to the federal authorities on a "silver platter"?

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Applicable constitutional provisions, statutes and rules are set forth in Appendix A, *infra,* pp. 1A, 2A.

STATEMENT OF CASE

Petitioner, Parnell Bowling, was indicted in a two count indictment under Title 18, Sec. 641 U.S.C. Count 1 charges him with unlawfully and wilfully receiving and concealing a Frieden Calculator, property of the United States, with intent to convert it to his own use. Count 2 charges the same, except that it refers to a Victor Listing Calculator (2a).[1]

A motion to suppress evidence was timely filed (4a through 11a). Evidence was presented. The motion was overruled (12a).

Petitioner was tried by jury, found guilty, and was sentenced to one year and one day on each count, the sentences to run concurrently.

Richard Scully, a Cincinnati, Ohio Police Department detective, was investigating the reported theft of an IBM machine from the IBM Company of Cincinnati, Ohio. He came to Newport, Kentucky to interview one Wesley Hennard (18a, 19a).

Hennard told Scully he got the IBM machine from a person named "Jake", and maintained this to Scully until he was arrested. Hennard then changed his story and said he had received the IBM machine from petitioner Bowling (18a, 20a).

---

[1] The letter "a" when used in this Petition refers to petitioner's Appendix below, copies of which have been filed with the Clerk of this Court.

Hennard told Scully during further conversation that he had seen other office equipment *in Bowling's Drug Store,* located in Newport, Kentucky (30a).

On April 2, 1963, notwithstanding that informant Hennard never told Scully he had ever seen any articles whatsoever in petitioner's home, Scully nonetheless, "taking a flyer", took from his own pocket a list of stolen items, on the "assumption" that he "expected or hoped to find" them in petitioner's home, among other places, and incorporated them into an affidavit for a search warrant to search *the home of petitioner,* in Cold Spring, Kentucky (20a, 21a), by stating in the affidavit that he:

> ". . . was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located *in the residence* described herein at the present time . . . ." (8a). (Italics ours.)

At 4:30 p.m. on the same date, a search warrant was issued by Hon. A. J. Jolly, Judge of the Campbell County, Kentucky Court, to search the residence of appellant Bowling, and seize "stolen articles mentioned in the affidavit hereto attached . . ." (9a). The items were not stated in the search warrant, and Campbell County officers Neltner and Arnold who were executing the search warrant did not have the affidavit with them (56a).

The search warrant was executed at the home of petitioner Bowling in Cold Spring, Kentucky by the Campbell County, Kentucky Police about 6 p.m. on April 2, 1963, in the company of Cincinnati, Ohio detectives and Newport, Kentucky police (36a, 39a, 40a).

Two Cincinnati detectives searched the basement of petitioner's home (36a). Officers from both the Newport and Campbell County, Kentucky Police Departments milled

about the upstairs of petitioner's home, occasionally helping the Cincinnati detectives (36a, 40a, 41a, 42). None of the articles listed by Scully in his affidavit were found either in Bowling's home, his drug store, or elsewhere (25a). The officers saw nothing they knew at the time was stolen (44a, 45a, 57a). They did nothing more than write down serial numbers (36a).

No one was arrested that evening, nothing was seized (but a Veratron Transceiver Radio so encased that the serial number could not be read) and the officers left (23a, 42a). A return was made on the face of the search warrant on April 2, 1963 (9a, 66a):

> "4-2-63
> Executed this warrant at 6:15 p.m. by searching above premises for articles believed stolen in Greater Cincinnati area.
>
> Lt. G. Arnold".

The following morning, April 3, 1963, the Cincinnati detectives checked the serial numbers they had obtained in petitioner's home the evening before with the Bureau of Records of the Cincinnati, Ohio Police Department, and then determined that some goods, including the Frieden calculator and the Victor Adding Machine (for which petitioner was later indicted) had been reported stolen (24a, 25a, 37a, 38a, 42a, 45a, 57a).

Later in the morning of April 3, 1963, Lt. Arnold of the Campbell County, Kentucky Police secured a warrant of arrest charging petitioner Bowling with possession of stolen property, and petitioner was immediately arrested in Newport, Kentucky (45a).

At the time of petitioner's arrest, Charles J. Schear, his attorney, who was present (45a), told Lt. Arnold that police officers were not to go out and search the Bowling

home on John's Hill Road, Cold Spring, Kentucky, nor to seize any material whatsoever at the home, unless they were armed with a proper search warrant (51a, 52a). There was no search warrant (58a).

While petitioner was being arrested in Newport, detectives Quitter and Collins of the Newport Police Department, together with two Newport Jail trustees (prisoners) were already at petitioner's home in Cold Spring, Kentucky, five miles outside the city limits of Newport (35a), with a moving van (47a). They were seizing and removing property from his home (58a, 59a). Later, Campbell County Police Officer Neltner arrived at the home to assist in removing goods (58a, 59a).

The Victor Adding Machine and the Frieden Calculator taken from petitioner's home on April 3, 1963 were turned over to FBI Special Agent Silas by the State officers. On April 8, 1963, Agent Silas swore to a complaint charging petitioner with receiving these two items as stolen goods (16a, 17a).

Neither Agent Silas nor any other Federal officer participated in the search of the Bowling home on April 2, 1963, under the search warrant issued by Judge Jolly; nor did they participate in the seizure made in the Bowling home on the morning of April 3, 1963 (16a, 17a), made without a search warrant. All evidence FBI Agent Silas received was from Kentucky State officers (17a). The evidence was turned over to Silas by the State officers on a "silver platter".

ARGUMENT

A writ of certiorari should be granted because the Sixth Circuit Court of Appeals failed to decide an important question of federal law, which has not been, but should be, settled by this Court (Issue 1); that other questions and issues here involved were decided in conflict with applicable decisions of this Court; that the search and seizure involved herein contravened the Fourth Amendment of the Constitution of the United States and therefore, the use in evidence of the items seized was prohibited; that this Court should review, reconsider and modify its holdings in the *Elkins* and *Rios* cases only to the extent that where a search and seizure would be invalid under a state's constitution, the state, and not the federal law, should be applicable in a case where the evidence is seized by state officers, under a state warrant, and turned over to federal authorities on a "silver platter".

1. The Allegations in the Affidavit for the Search Warrant Were Knowingly, Falsely and Fraudulently Made by Affiant, and Were of Such Material Relevancy as to Destroy the Integrity of the Affidavit, Rendering Inadmissible Into Evidence Property Seized.

The Sixth Circuit did not decide this issue although it called it "The more formidable problem posed by this case, . . ." (Appendix B, *infra*, p. 12A; 351 F.2d 236, 241).

It by-passed the merits of this issue on the mistaken theory that this was "apparently" never specifically raised before the District Judge, notwithstanding the fact that in its decision it stated that one of the issues "presented to the District Judge" by the motion to suppress evidence made in the district court was that "The search warrant as issued

was fatally defective because issued without 'basis of fact' and as a 'fishing expedition' or 'flyer'." (Appendix B, *infra*, pp. 5A, 12A; 351 F.2d 236, 237.)

The Supreme Court of the United States has never directly decided this issue, and it is one that should be settled by this Court. The closest this Court has come is in *Rugendorf* v. *United States*, 376 U.S. 528, where, in dealing with a claim of falsity in an affidavit, this Court said:

> "Petitioner attacks the validity of the search warrant, This Court has never passed directly on the extent to which a court may permit such an examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' . . ."

This issue was raised in the District Court by petitioner where one of the grounds set forth in the motion to suppress was stated as follows (5A; and Appendix E, *infra*, 21A):

> "That the affidavit for search warrant, and the search warrant were made and issued without basis of fact, and solely as a 'fishing expedition' and as 'a flyer'."

Extensive evidence was introduced in the District Court before the District Judge (16a-72a). The District Judge did not render a written opinion.

But assuming petitioner had not raised the issue in the District Court in the exact or technical way the Sixth Circuit thought it should have been, the issue should have been considered under Rule 52(b), Federal Rules of Criminal Procedure, which states that plain error or defects affecting substantial rights may be noticed although they are not brought to the attention of the court. The Sixth Circuit referred to Rule 52(b) in footnote 1, on printed page 10 of its decision (Appendix B, *infra*, p. 13A), but failed to follow it.

This is not a case where falsity in an affidavit to secure a search warrant becomes a part of the affidavit through mistake, inadvertence, or because of false information given affiant by an informer believed to be reliable. This is a case where the affiant willfully, knowingly and deliberately put his own false statements in the affidavit. These statements were of substantial materiality, without which a search warrant would not have issued. It is this type of case which this Court has never passed upon, but should.

The pertinent testimony of affiant Lt. Scully bearing on this point, heard by the District Judge on the motion to suppress is (20a, 21a):

> Q. Then you swore the — to the affidavit on April the second, 1963, listing five items, a Victor Adding Machine with a serial number and then four other items, isn't that correct?
>
> A. Yes, sir.
>
> Q. Now will you tell His Honor Judge Swinford, why you listed those five items in that affidavit?
>
> A. In talking to Mr. Hennard, he stated that Parnell Bowling had some other office equipment in his drug store, he told us it was in the rear where the prescription department was and that he didn't know whether they were typewriters or adding machines but it was office equipment and on that assumption, when I filed this affidavit, of the list of stolen items that I had in my pocket, I incorporated these serial numbers of items that I expected or hoped to find either in Parnell's drug store or in his home, or in a building that was under construction at Eighth and Central.
>
> Q. In other words, let me see, Mr. Scully, if I understand you correctly. All that Hennard told you is that in Bowling's drug store and you know as a matter of fact that Mr. Bowling owns and operates a drug store on Eighth and Central in the City of Newport, isn't that correct?
>
> A. That is correct.

Q. He told you that in Bowling's drug store, in the prescription department, were some items of office equipment, isn't that correct?

A. That is correct.

Q. So that based upon that, you then, from your file in Cincinnati, picked out items that you listed in here, with the serial number, isn't that correct?

A. That's correct.

Q. Hennard didn't give you these items and the serial numbers did he?

A. He did not.

Q. And, as a matter of fact, what Hennard told you, that is Hennard said he saw them in the drug store, isn't that correct?

A. Saw some items in the drug store.

Q. Isn't it correct, Officer Scully, that actually you didn't know at that time whether you would ever find these items or any other items there, but what you were in effect doing was taking a flyer in the hope that you would find these somewhere in Parnell Bowling's place?

A. That's correct.

Q. Is that right?

A. That's right.

On cross examination by Assistant U. S. Attorney Brooks, Lt. Scully testified (30a):

"Q. Did he indicate that he had actually seen office equipment on the premises of Parnell Bowling?

MR. WEINTRAUB: I want to object to that, if Your Honor please, on this basis: What premises of Parnell Bowling?

MR. BROOKS: On any premises of Parnell Bowling.

A. Yes, he did.

Q. What premises?

A. The drug store at Eighth and Central."

After receiving the foregoing information from informant Hennard, the sole source of affiant's information, Lt. Scully swore to the following affidavit (8a):

AFFIDAVIT FOR SEARCH WARRANT

Affiant, Richard Scully, being first duly cautioned and sworn states that the laws of the Commonwealth of Kentucky, which prohibit receiving and possessing stolen property are being violated by Parnell Bowling at his residence known and designated as Box 146 F, Johns Hill Road, Cold Spring, Kentucky, which consists of a one (1) story red wire cut brick building; that affiant's reasons for stating the laws are being violated are that affiant was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located in the residence described herein at the present time:

1 Victor Adding Machine, Serial No. 1635-392

1 IBM Electric Typewriter, Serial No. 1261503

1 Underwood Electric Typewriter, Serial No. E-13-8753824

1 IBM Electric Typewriter, Serial No. 1186204

1 Royal manual typewriter, Serial No. 6409538

and other stolen property, are in the premises of the said Parnell Bowling and are being concealed in the premises occupied by the said Parnell Bowling, which said premises are more particularly described as follows:

A one (1) story red wire cut brick building located at Box 146 F, Johns Hill Road, Cold Spring, Kentucky.

Affiant further states that the conduct described herein which occurred in and on the premises described herein are in violation of the laws of Ken-

tucky and contrary to the peace and dignity of the Commonwealth of Kentucky.

/s/ RICHARD SCULLY

Subscribed and sworn to before me, Notary Public, this 2nd day of April, 1963.

/s/ BETTE L. RIEDMATTER
My comm. expires: 3/14/64

A. J. JOLLY, Judge

Comparing the testimony of affiant Scully (20a, 21a, 30a) with the affidavit Scully signed (8a), three factual inaccuracies of a material relevancy to the showing of probable cause, each of which destroyed the integrity of the affidavit, are readily apparent:

1. Affiant's information as to the articles listed in the affidavit did not come from informant Hennard but was from a list Scully took from his pocket (20a, 21a);

2. At no time did Scully testify that informant told him that petitioner had any "stolen" articles whatsoever, yet Scully swore in his affidavit that Hennard informed him the "following stolen articles" and "other stolen property" were in petitioner's residence (8a);

3. Although Scully testified that informant told him that the "equipment" he saw was in petitioner's "drug store at Eighth and Central" (30a), which is in Newport, Kentucky, Scully swore in his affidavit that informant told him that stolen articles and property were "located" and "are being concealed" by petitioner at his residence in Cold Spring, Kentucky (8a).

The factual inaccuracies contained in the affidavit were within the personal knowledge of the affiant, because they were not supplied by the informant but were admittedly

concocted by the affiant himself, who "was taking a flyer in the hope he (you) would find these somewhere in Parnell Bowling's place" (21a).

The false affidavit started into motion a process whereby appellant's rights were illegally invaded, by duping the Magistrate into issuing a search warrant not based upon probable cause.

In *Rugendorf* v. *U. S., supra,* at page 532, this Court said:

> "In addition, the affidavit alleged that Leo and Samuel Rugendorf were brothers and that Leo was a fence for professional burglars. Although one of the informants who gave the latter information added, incorrectly, that Samuel Rugendorf was associated with Leo in the meat business, there was direct information from another informant of the FBI that Leo was a fence, and nothing was shown to prove this untrue. The factual inaccuracies depended upon by petitioner to destroy probable cause—i. e., the allegations in the affidavit that petitioner was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."

Paraphrasing *Rugendorf* to place the law in positive form, the decision establishes that where factual inaccuracies of material relevancy to the showing of probable cause, within the personal knowledge of the affiant, are stated in an affidavit to secure a search warrant, it goes to the integrity of the affidavit and destroys probable cause for issuing the search warrant.

In *King* v. *U. S.,* 282 F.2d 398, footnote 4, at page 400, cases are cited showing the rule in federal courts to be that ". . . false facts given by affiant will vitiate the war-

rant and search". The Court in discussing the requirements of Section 41(e) said:

> "It would be an anomaly if it could be said that the rule has been obeyed when, instead of omitting the affiant's name altogether, another person's name is deceptively substituted. If it should be held that the use of a mere sham has the effect of validating the warrant, then the aggrieved party would be frustrated in his effort to discover who the affiant is and to test the legality of the search, as authorized by the rule. The rule's remedial procedure would be vitiated."

The use of an affidavit containing deliberately made false, substantial and material allegations necessary to the issuance of a search warrant should not be permitted. This Court recognized a similar injustice when it abolished the "silver platter" doctrine by the *Elkins* decision, 364 U.S. 206. Its subsequent decisions have reinforced its determination to stamp out this form of tyranny and injustice. It should do so in this case.

The Fourth Amendment to the Federal Constitution and Section 10 of the Constitution of Kentucky each guarantee against unreasonable searches and seizures. Each provides that a warrant shall not issue but upon probable cause, *"supported by oath or affirmation"* (italics ours). This means an oath made in good faith. It does not mean an oath made by an affiant who knows what he is swearing to is false, but which allegations he needs to secure a search warrant.

To permit this kind of conduct condones the use of deception and falsity as a means of avoiding the issue of "probable cause". Its result is "unreasonable searches and seizures" specifically prohibited by both the Federal and State Constitutions. It renders a person affected helpless, and without remedy.

This Court must enunciate the law clearly and forcefully in order to stamp out a vicious practice indulged in by over-zealous "officers of the law".

2. The Affidavit for a Search Warrant Did Not State Sufficient Facts to Establish Probable Cause for the Issuance of the Search Warrant.

A. The Affidavit for a Search Warrant Stated Conclusions Only.

The affidavit (Printed in full, Appendix E, pp. 17A) in this case, disregarding its falsity, is itself insufficient to support the warrant because it was made by affiant upon hearsay information given to the affiant by a named informant, W. A. Hennard, but does not disclose on its face the basis for crediting the informant's conclusion. Everything contained in the affidavit is a conclusion.

Under both Federal and Kentucky decisions an affidavit which merely states affiant's belief, or the belief of one not the affiant, without setting forth facts upon which the belief is based, does not establish probable cause for issuance of a search warrant. *United States* v. *Ventresca,* 380 US 102,; *Aguilar* v. *Texas,* 378 US 109; *Jones* v. *U. S.,* 362 US 257;*Giordenello* v. *U. S.,* 357 US 480; *Nathanson* v. *U. S.,* 290 US 41; *Schoeneman* v. *U. S.,* 317 F 2d 173; *Commonwealth* v. *Davenport,* 366 SW 2d 171; *Messer* v. *Commonwealth,* 350 SW 2d 486.

The pertinent part of the affidavit (Appendix E, pp. 17A) is as follows:

> ". . . that affiant's reasons for stating the laws are being violated are that affiant was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located in the residence described herein at the present time:

> 1 Victor Adding Machine, Serial No. 1635-392
> 1 IBM Electric Typewriter, Serial No. 1261503
> 1 Underwood Electric Typewriter, Serial No. E-13-8753824
> 1 IBM Electric Typewriter, Serial No. 1186204
> 1 Royal manual typewriter, Serial No. 6409538
> and other stolen property, are in the premises of the said Parnell Bowling and are being concealed in the premises occupied by the said Parnell Bowling, which said premises are more particularly described as follows: . . . ."

All that the affidavit relates is that informant Hennard stated to affiant Scully that on the date that the affidavit was made certain stolen articles were in Bowling's possession concealed at his residence, "at the present time". These are bare conclusions. The issuing Magistrate should have been informed by the affidavit *when and how* the informant came to his conclusion that stolen articles were located in appellant's home. (Did informant speak from personal knowledge? Did informant actually see them there? When did he see them there?).

The allegations in the present affidavit parallel the affidavits in *Aguilar, Nathanson* and *Giordenello, supra.*

In *Giordenello,* 357 US 480, at page 481, a federal narcotics agent swore to a complaint, which read in part:

> "The undersigned complainant (Finley) being duly sworn states: that on or about January 26, 1956, at Houston, Texas, in the Southern District of Texas, Vito Giordenello did receive, conceal, etc., narcotic drugs, to-wit: Heroin, Hydrochloride, with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code."

In holding the complaint to be insufficient to support the warrant, the Court, at pages 486-487, stated:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer. The insubstantiality of such an argument is illustrated by the facts of this very case, for Finley's testimony at the suppression hearing clearly showed that he had no personal knowledge of the matters on which his charge was based. In these circumstances, it is difficult to understand how the Commissioner could be expected to assess independently the probability that petitioner committed the crime charged."

In *Nathanson* (290 US, at pages 44-45) the applicable recitals are as follows:

> "Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. . . ."

The Supreme Court struck down this affidavit, and later, in *Jones* (262 US, at page 269) said:

> "We held in Nathanson v. U. S., 290 US 41, 78 L ed 159, 54 S Ct 11, that an affidavit does not establish probable cause which merely states the affiant's belief

> that there is cause to search, without stating facts upon which that belief is based. A fortiori this is true of an affidavit which states only the belief of one not the affiant."

In *Aguilar,* two Houston police officers applied to a local Justice of the Peace for a warrant to search for narcotics in petitioner's home, and in their affidavit recited that:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

Holding this affidavit to be insufficient because it stated mere conclusions, the Court in reaffirming *Nathanson, Giordenello* and *Jones,* said:

> "The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief," or "mere conclusion."

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 US 257, 4 L ed 2d 697, 80 S Ct 725, 78 ALR2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 US 528, 11 L ed 2d 887, 84 S Ct 825, was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," Giordenello v. United States, supra, 357 US at 486, 2 L ed 2d at 1509; Johnson v. United States, supra, 333 US at 14, 92 L ed at 440, or, as in this case, by an unidentified informant."

The latest pronouncement on this subject is *Ventresca, supra,* where this Court held that although "Technical requirements of elaborate specificity" need not be set forth in an affidavit to sustain its validity, "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See *Aguilar* v. *Texas, supra.*"

The affidavit at issue here was not detailed and specific as the *Ventresca* affidavit, and it fails to meet the standards of interpretation laid down in *Ventresca* for reviewing courts to follow.

B. The Affidavit for a Search Warrant did not show a substantial basis for crediting the hearsay.

In *Jones,* the Supreme Court state (362 US at page 271):

> "It is not suggested that the Commissioner doubted Didone's word. Thus we may assume that Didone had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. **Had that been all it might not have been enough;** but Didone swore to a basis for accepting the informant's story. *The informant had previously given accurate information.* His story was corroborated by other sources of information. And petitioner was known by the polce to be a user of narcotics. *Corroboration through other sources of information reduced the chances of a reckless or PREVARICATING tale;* that petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history." (Emphasis added).

Assuming, arguendo, that it would have appeared in the affidavit of Scully that informant Hennard told Scully that on the date of the affidavit informant had purchased stolen goods from appellant at his home, and that informant saw other named and unnamed stolen property in appellant's home when the purchase was made, under *Jones* even these statements in the affidavit could not cure its defects, because the affidavit failed to show the basis for accepting informant's information.

As required in *Jones,* Scully's affidavit should have stated that Hennard previously had given accurate information; that his story was corroborated by other sources of information; and that appellant was a known dealer in stolen goods.

In the instant case there is no reference to informant,

W. A. Hennard, being reliable, or having given previous reliable or correct information to the affiant. To the contrary, there is a statement in the affidavit that Hennard is a person "who is in custody." It is likewise important to note from the testimony that informant first told affiant Scully he got the IBM machine from "Jake", and later, after arrest, changed his story and named petitioner (19a, 20a, 37a).

3. The Search Warrant Did Not Sufficiently Describe and Identify the Property to Be Seized, and Did Not State the Grounds or Probable Cause for Its Issuance. It Was a General Warrant to Conduct a General Exploratory Search.

A. The Search Warrant Did Not Identify the Property to Be Seized.

The Fourth Amendment provides that a warrant shall describe the things to be seized. Rule 41(c), Rules of Criminal Procedure, provides the judge or commissioner upon proper showing "shall issue a warrant identifying the property." The warrant in this case failed under each because it failed to identify the property the officers were to search for and seize.

The search warrant is printed at Appendix E, *infra,* p. 19A. The only reference to or description or identification concerning property to be searched for or seized was the direction of the issuing judge to the police officers to search the premises ". . . for the detection of and seizure of stolen articles mentioned in the affidavit hereto attached . . .". Aside from the legal insufficiency of the warrant on its face, no affidavit was attached to or accompanied the warrant (56a).

That the warrant itself was insufficient (even as a practical matter) in failing to particularly describe things to be detected and seized, is readily apparent from the testimony of Police Officer Linus Neltner (55a, 56a):

Q. You and Lt. Arnold were executing a search warrant issued by His Honor Judge A. J. Jolly, judge of the Campbell County Court, weren't you?

A. That's correct.

Q. Were you actually doing that? Were you actually there executing that warrant?

MR. BROOKS: I object.

THE COURT: He says he was.

Q. Well, then tell us, under the search warrant, what items were you looking for?

A. We were looking for office equipment.

Q. Well, what particular office equipment did you first go out there to look for, under the search warrant?

MR. BROOKS: The warrant speaks for itself.

THE COURT: Let him have the search warrant. I think the court may assume that he is looking for whatever it says on the search warrant.

(Reporter's note: An off-the-record discussion was held at this time.)

MR. WEINTRAUB: Well, Officer Neltner, I am handing you what has been admitted as a true and correct copy of the search warrant that you and Lt. Arnold were armed with. Now tell His Honor, Judge Swinford, what items you were looking for.

MR. BROOKS: Your Honor, I think the warrant speaks for itself. The affidavit describes them and other stolen property and that is what he said.

MR. WEINTRAUB: No, no, if Your Honor please.

THE COURT: Overruled. He is looking at the search warrant, he had to be searching for some particular thing when he went out there under a search warrant.

MR. BROOKS: Yes, sir.

Q. Would you answer the question?

THE COURT: What were you searching for when you went there under that search warrant. What were you looking for?

A. We were looking for office equipment, Your Honor.

THE COURT: Office equipment. Now, he asked you what particular office equipment. Was there any particular office equipment?

A. Typewriters.

THE COURT: Was it on the search warrant?

A. It doesn't say here. Your Honor, it doesn't state on the search warrant.

MR. BROOKS: I think probably he may be looking at the warrant, rather than the affidavit, Your Honor.

MR. WEINTRAUB: Well, if Your Honor please, I want to object to that.

MR. BROOKS: Well, he can't remember the names and numbers of these particular machines, Your Honor.

THE COURT: Objection —

MR. WEINTRAUB: The United States Attorney knows better than that.

THE COURT: Objection sustained. He has to go by the warrant.

MR. BROOKS: The affidavit describes the property.

THE COURT: I know but he didn't have the affidavit when he went to execute the warrant. The affidavit is back with the county judge.

Mr. Brooks, Assistant U. S. Attorney, said the warrant speaks for itself, and the Court stated that the officer "has to go by the warrant." Then noting the dilemma of the officer because the warrant does not describe anything but says only "stolen articles," Mr. Brooks then conceded that it was the affidavit that described the property. To this

the Court retorted that the officer didn't have the affidavit when he went to execute the warrant because the affidavit was back with the County Judge! (56a).

Bearing out the Court's last comment, and the confusion in the mind of the officer created by the lack of description in the search warrant, is the return made on the warrant (9a):

> "4-2-63.
> Executed this warrant at 6:15 P.M. by searching above premises for *articles believed stolen in Greater Cincinnati area.*" (Italics ours).

The officers themselves did not know what they were looking for!

The fact that this warrant merely directed the officers to search for and seize "stolen articles" makes this search and seizure a "general exploratory search," which is forbidden. *Go-Bart Importing Co.* v. *U. S.*, 282 US 344; *Marron* v. *U. S.*, 275 US 192.

It was this very type of general warrant that this Court condemned in *Stanford* v. *Texas*, 379 U.S. 476, when it held that it failed to meet the requirements of the Fourth Amendment that warrants must particularly describe the "things to be seized", saying that the "indiscriminate sweep of that language [in the warrant at issue] is constitutionally intolerable".

B. The Search Warrant did not state the grounds or probable cause for its issuance.

The warrant was insufficient because it failed to "state the grounds or probable cause for its issuance," as required by the Fourth Amendment and by Rule 41 (c). Nowhere in the warrant were any "grounds" or "probable cause" stated.

Wong Sun v. *U. S.*, 378 US 471, involved an arrest without a warrant under the Narcotic Control Act of 1956, and the Court held the terms "probable cause" for purposes of the Fourth Amendment and "reasonable grounds" as used in the statute, mean substantially the same.

We submit the failure to "state the grounds or probable cause for its issuance" was contrary to Rule 41 (c), and was a violation of appellant's right under the Fourth Amendment. See Headnote 1 in 9 L.ed 2d at bottom of page 449, citing *Draper* v. *U. S.*, 358 US 307, 310 note 3, 3 L.ed 2d 327, 330, 79 S. Ct. 329; *United States* v. *Walker* (CA 7, Ill), 246 F.2d 519, 526.

4. The Property Introduced Into Evidence Was Illegally Seized and Taken From the Home of Petitioner Without a Search Warrant.

The right to be secure in one's home against unreasonable searches and seizures, especially against a search and seizure without a search warrant, is a basic constitutional guarantee. Rule 41(e), Rules of Criminal Procedure, provides for the suppression as evidence of property "illegally seized without warrant". Petitioner made such timely motion to suppress.

On the face of the warrant issued by Judge Jolly, there appears at the bottom thereof the following (Appendix E, *infra*, p. 19A):

> "4-2-63.
> Executed this warrant at 6:15 P.M. by searching above premises for articles believed stolen in Greater Cincinnati area.
> /s/ Lt. G. Arnold"

At 4:30 P.M., April 2, 1963, a search warrant was issued to search the home of petitioner. This was done, as the

return shows on April 2, 1963 — the same day. On this day the officers left petitioner's home. They arrested no one; they found nothing, and took nothing that was stolen. They did not find any of the items listed in the search warrant. All they did was list serial numbers. Late the next morning, April 3, 1963, the officers went back to petitioner's home and at that time seized and removed property from it, including the two items set forth in the indictment. They had no warrant or other document or authority with them on the morning of April 3, 1963 authorizing or directing this action.

We can find no authority permitting the officers to return to petitioner's home the next day (April 3, 1963), and to search and seize property without a new search warrant, the warrant of the previous day having been executed, it was at an end.

5. The Validity of the Affidavit and Search Warrant Should Be Determined by Kentucky Law.

We respectfully submit that this Court should grant certiorari to re-evaluate its decisions in *Elkins* v. *U. S.*, 364 U.S. 206, and *Rios* v. *U. S.*, 364 U.S. 253, to the extent that it was held that the test of whether evidence has been obtained in an unreasonable search and seizure by state officers and, consequently, not admissible in a federal criminal trial, is one of federal law to be determined in accordance with the basic principles governing the validity of searches and seizures by federal officers under the Fourth Amendment, and is not to be enlarged or diminished by state courts.

We respectfully advance the proposition that *Elkins, supra,* and *Rios, supra,* should be modified to the extent that where, as in this case, evidence is seized by state officers,

under an affidavit and search warrant issued by the authority of the state, and which are invalid under the state's constitution, federal courts should hold such evidence not admissible in a federal criminal proceeding. Or stating it conversely, where a state by its constitution and the decisions of its highest court recognizes and gives equal, if not greater effect to the right of a person to be secure against unreasonable search and seizure as does the Fourth Amendment, its law, that the search and seizure is invalid, should be applied where such state-produced evidence is sought to be introduced in a federal criminal trial.

To hold otherwise means that evidence obtained by an illegal search and seizure made by state officers, clearly violating a citizen's rights under his state's constitution prohibiting its use in that state's courts, can be used against him by the expedient of getting the case into federal court, as was done in *Rios, supra,* which is contrary to the spirit at least of *Elkins, supra.* It allows to be done by indirection that which a state court of the state initiating the proceedings would not be permitted to do. It condones, and even tends to encourage, subterfuge and violation of law by state officers.

A search and seizure, invalid at its inception, should not be given life in another jurisdiction. We conceive the correct rule should be that a federal court should have the right to review only when a state fails to follow reasonable standards; not when it does follow them! To permit the review in federal court in all cases means the "wiping out" by federal courts of the search and seizure clauses of the constitutions of all 50 states.

Kentucky is an exclusionary state. Under Section 10 of the Kentucky Constitution the affidavit in this case is faulty and fatal because it fails to state "when and how" the informant arrived at his information. Ken-

tucky has held that when an affidavit is based on information or belief, it must disclose *when* the observation was made by the informant. In *Messer* v. *Commonwealth,* 350 SW 2d 486 (1961), the Kentucky Court of Appeals held:

> "The affidavit for the warrant issued for the search of his premises was based on information and knowledge, stated as follows:
>
> " 'Paul Stamper, Sheriff Knox County, the affiant, was told by Charles Mays, Deputy Sheriff Knox County, that Lige Messer a known boot legger of Knox County has now in his possession a large quantity of intoxicating beverages, whiskey, beer & etc. for the purpose of sale on his premises, or filling station, which he has leased, & also in cars of various kinds located on said premises, and under his control & known as Messer Pan Amm Filling Station located at Heidrick, Knox Co. Ky. at Junction of U. S. 25E & Highway 11 on Right hand side going north.'
>
> "Since the appellant's conviction, this Court, on June 23, 1961, in Henson v. Commonwealth, Ky., 347 S.W.2d 546, after reviewing the decisions therein collected, restated the principle that affidavits for search warrants must disclose the time at which the observation was made which is the source of the informant's knowledge. The above quoted affidavit fails to meet that standard, and hence the affidavit was insufficient to support the warrant and the evidence obtained on the search was not admissible. It is unnecessary to discuss other grounds raised for reversal, but see Henry v. Commonwealth, Ky., 316 S.W. 2d 864, admitted by the Commonwealth as sustaining appellant's contention for reversal."

In the instant case, the affidavit fails to state "when" the informant Hennard obtained his information.

In *Commonwealth* v. *Davenport,* 366 SW 2d 171 (1963), the Kentucky Court of Appeals required the affidavit to

not only state "when" but *"how"* the informant reached his conclusions:

"The affidavit which was excuted by the sheriff of Whitley County reads in part as follows:

" 'The affiant states that he bases the aforesaid belief on information furnished him by Isham Alder, a reputable citizen of Whitley County, Kentucky, and who is also a citizen and resident of Whitley County, Kentucky, and a Constable of said County and State, and who on today, July 30, 1961, told the affiant as follows:

" 'Loraine (Mrs. Tracy) Davenport is selling whiskey; that she just bought a big load of red whiskey, wine, gin and other alcoholic beverages, and she has some whiskey, wine, beer, gin and other intoxicating beverages now in her house or premises adjacent thereto on today for the purpose of sale, gift, or barter in violation of the Local Option Law."

"In Henson v. Commonwealth, Ky., 347 S.W.2d 546, it was held that where an affidavit for a search warrant states the essence of illegal possession as an ultimate fact, the affidavit must relate how and when the fact was observed.

"In Williams v. Commonwealth, Ky., 355 S.W.2d 302, it was pointed out that even before the Henson case, it was the rule that when an affidavit is based on information or belief, it must disclose when the observation was made by the informant. See also Williamson v. Commonwealth, Ky., 349 S.W.2d 825, and Messer v. Commonwealth, Ky., 350 S.W.2d 486.

"It is argued by the Commonwealth in the case at bar that the expression, 'who on today, July 30, 1961 told that affiant' definitely fixes the date and time the observation was made, the information obtained and imparted. The quoted expression, together with the statement that she had just bought a big load of alcoholic beverages and that she had some of such beverages

> in her house, is perhaps specific enough as concerns the time that appellee had in her possession the intoxicating liquors for the purpose of sale, but it does not state the manner in which the observation was made."

The affidavit in the present case also fails to disclose "how" informant Hennard knew petitioner had stolen goods in his possession at his home.

In directing a search for "stolen articles mentioned in the affidavit hereto attached . . ." (Appendix E, *infra*, p. 19A), the warrant is defective because it fails to describe the property sought, as required by Section 10 of the Kentucky Constitution. The affidavit was not attached to the warrant (56a).

Under Kentucky law, the affidavit cannot aid the warrant. In *Smith* v. *Commonwealth*, 276 SW 495, 496, the Kentucky Court of Appeals held:

> "The affidavit upon which the warrant was based contained the same description, with the additional words, 'situated on Main street.' However, the officer proceeds under the warrant alone, and it is not aided by the affidavit, therefore it is essential for the warrant to describe the property to be searched with sufficient accuracy to locate it with reasonable certainty."

Following this same line of reasoning, the Kentucky Court of Appeals held in *Staton* v. *Commonwealth*, 240 SW 2d 630, that the warrant must be sufficient in and of itself.

The Fourth Amendment to the Federal Constitution and Section 10 of the Kentucky Constitution are identical almost to the wording. Each provides for the security of people from unreasonable searches and seizures. Each pro-

vides that no warrant shall issue without probable cause, supported by oath of affirmation. Each provides that the place to be searched and the persons or things to be seized must be described:

FOURTH AMENDMENT, FEDERAL CONSTITUTION	SECTION 10, KENTUCKY CONSTITUTION
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."	"The people shall be secure in their persons, houses, papers and possessions from unreasonable search and seizure; and no warrant shall issues to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

The decisions of the Kentucky Court of Appeals interpreting Section 10 of the Kentucky State Constitution relating to searches and seizures are in consonance with the "standard of reasonableness" a state must guarantee. *Ker* v. *California,* 374 US 23.

The *Elkins* case, 364 US 206, abolished the "silver platter" doctrine, so that federal officers could not reap the benefit of evidence wrongfully obtained by state officers.

On June 15, 1964, this Court handed down three important decisions relating to scope of the incorporation of the Fourth and Fifth Amendments in the Fourteenth Amendment. *Aguilar* v. *Texas,* 378 US 109; *Malloy* v. *Hogan,* 378 US 1; and *Murphy* v. *Waterfront Commission,* 378 US 52.

Aguilar deals with failure to establish probable cause in the issuance of a search warrant in state proceedings.

Malloy guarantees the protection of the Fifth Amendment in proceedings in a State Court.

Murphy reversed *U. S.* v. *Murdock,* 284 US 141, and *Feldman* v. *U. S.* 322 US 487, which cases had held that testimony self-incriminatory under State law could be compelled in Federal Courts and used therein as well as the obverse, that testimony self-incriminatory under Federal law could be compelled in State Court and introduced as evidence therein. This Court in the *Murphy* case stated:

> "We hold the constitutional rule to be that a State witness may not be compelled to give testimony which may be incriminating under Federal law unless the compelled testimony and its fruits cannot be used in any manner by Federal officials in connection with a criminal prosecution against him. *We conclude, moreover, that in order to implement this constitutional rule and accomplish the interest of the State and Federal Governments in investigating and prosecuting crimes, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.*" (Emphasis added.)

The *Mapp, Ker,* and *Aguilar* cases, wherein this Court incorporated the standards of the Fourth Amendment into the Fourteenth Amendment, arose under state proceedings *where each state failed to apply proper standards.*

We submit that where a State has clearly demonstrated it is applying the correct rule of "the standard of reasonableness" holding invalid unreasonable searches and seizures, that the protection thus afforded by the state which initiated the proceedings should follow into the Federal Court.

While the *Elkins* case said the "test is one of Federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed," there must be a re-evaluation in view of *Ker, Aguilar, Malloy* and *Murphy*. Otherwise, the spirit of *Elkins* is violated and in jeopardy.

The *Murphy* case held "the Federal Government must be prohibited from making use of compelled testimony and its fruits." The same reasoning should forbid the use by the Federal Government of State "compelled" evidence seized by state officers, under state process, clearly in violation of Section 10 of the Bill of Rights of the Kentucky Constitution, where the State holds such evidence inadmissible because of the invalidity of the affidavit and search warrant issued under its (the state's) authority. Where a State upholds and enforces proper standards, as does Kentucky, there should be no necessity for re-assessment by a Federal Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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November 30, 1965

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fourth Amendment, Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 10, Constitution of Kentucky

§ 10. Security from search and seizure; conditions of issuance of warrant. The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Rule 41. Search and Seizure

(a) * * *

(b) * * *

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched

. . . It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. . . .

(d) * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. . . .

APPENDIX B

No. 16226

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PARNELL BOWLING,
Defendant-Appellant.

APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

(Decided September 29, 1965.)
(Filed September 29, 1965.)

Before: Cecil,* Phillips and Edwards, Circuit Judges.

Edwards, Circuit Judge. The Fourth Amendment prohibits "unreasonable searches and seizures." It also specifically allows for searches and seizures upon "probable cause" and the issuance of a judicial warrant. In such cases as *Mapp* v. *Ohio,* 367 U.S. 643 (1961); *Aquilar* v. *Texas,* 378 U.S. 108 (1964); *United States* v. *Ventresca,*

* Lester L. Cecil became a Senior Circuit Judge on August 1, 1965.

380 U.S. 102 (1965); *Stoner* v. *California,* 376 U.S. 483 (1964) and *Preston* v. *United States,* 376 U.S. 364 (1964), the Supreme Court of the United States has spelled out its desire to encourage the use of search warrants wherever it was reasonably possible for the police to procure one.

The Supreme Court has also made clear that highly technical attacks upon affidavits and warrants where sought and used are not to be encouraged.

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca, supra* at 108.

Herein, with ample reason to believe that defendant was operating as a fence for stolen business machines, the police officer concerned went to two courts to procure three different search warrants in order to search — more or less simultaneously — the three logical storage places which they knew defendant to possess. In two of the places searched, the searchers drew blanks. In the third, defendant's home, the searchers discovered a basement full of stolen property — including the business machines herein concerned.

Two of these machines had been stolen from agencies of the United States government. Their recovery resulted in the instant indictment under which defendant was charged with unlawfully and willfully receiving and concealing property of the United States, with intent to convert it to his own use in violation of Title 18 U.S.C. § 641.

Defendant was tried by a jury. A motion to suppress evidence was made and denied. Defendant was found guilty and sentenced to one year and one day on each count, with the sentences to run concurrently.

The sole issue on this appeal pertains to the District Judge's denial of the motion to suppress evidence. That motion was filed before trial and was the subject of extensive evidence before the District Judge. It was lengthy and technical and was amended on the day of hearing. The issues as presented to the District Judge may be summarized as follows:

1. The search warrant as issued was fatally defective because issued without "basis of fact" and as a "fishing expedition" or "flyer."
2. That it was fatally defective as too indefinite and vague as to the objects of the search.
3. That the evidence seized and sought to be introduced was not seized under the search warrant at all because the search warrant had been "returned" prior to the seizure.
4. That the search was illegal because not conducted by the officers specifically authorized to conduct it.

The facts as developed at hearing present an interesting story. A Cincinnati Police Department detective, Lt. Scully, having been told of theft of an IBM typewritter on which a "ball" was missing, advised the IBM "people," "in

the event anybody orders this particular ball, have one of your salesmen check the item and get the serial number off of it, because it might be one of the stolen pieces of equipment."

Subsequently, a businessman in Fort Thomas, Kentucky, did order a "ball" and the IBM people did notify Lt. Scully, and on checking the serial numbers of this machine, he ascertained that it was the one previously reported stolen. Asked where he got the stolen machine, the Fort Thomas businessman reported he got it from a W. A. Hennard of Newport, Kentucky.

The story continues from the transcript:

"Q Tell us what happened when you got to Hennard's place of business.

"A When we entered Hennard's place of business, I asked him about this IBM machine and he stated that he had sent it up there on memorandum and I asked him where he purchased it. He said a fellow in an old gray station wagon had brought it in and sold it to him. I asked him who the man was; he said he didn't know. While I was there, I observed a piece of equipment that was stolen in Cincinnati on Curtis Street.

"Q Now, this is a second piece of equipment?

"A This is a second piece of equipment that did not come from the I.B.M. people.

"Q Were you able to identify that second piece of equipment?

"A I had the serial number of that piece of equipment in my pocket at that time.

"Q Along with other numbers that you also had with you?

"A That is right.

"Q All right, did you face Hennard with this information?

"A I did.

"Q And where did he tell you that he got that piece of equipment?

"A Got it from the same man that had the old gray station wagon.

"Q Did he ever change his story and tell you where he got this piece of machinery?

"A Not that day, he did not.

"Q And when did he tell you?

"A The next day.

"Q Was that on April the second of this year?

"A That's correct.

"Q When did he tell you that day?

"A On the second?

"Q Yes.

"A Told me he had gotten it from Parnell Bowling, along with other numerous pieces of office equipment.

"Q How long did he indicate he had been dealing with Parnell Bowling for office equipment?

"A I can't answer that question.

"Q Did he indicate he had a sizeable account with him?

"A Yes, he did.

"Q Did he indicate whether or not Parnell Bowling still had, to his knowledge, other business machines and equipment?

"A He did, sir.

* * *

"Q Did he indicate whether or not he had a sizeable account with Parnell Bowling?

"A. He did.

"Q Did he indicate that he had dealt in some volume with him?

"A He stated that this home that was under construction had new sinks and new equipment that would go into a home and that he had traded the equipment to renovate this building for this office equipment?

"Q Did he indicate that he had actually seen office equipment on the premises of Parnell Bowling?

"MR. WEINTRAUB: I want to object to that, if Your Honor please, on this basis: What premises of Parnell Bowling?

MR. BROOKS: On any premises of Parnell Bowling.

"A Yes, he did.

"Q What premises?

"A The drug store at Eighth and Central.

"Q Did he tell you whereabout in the store he saw—

"A Yes, he did. He said it was in the rear of the store where he filled the prescriptions on a range or a stove or something back there.

"Q Now, on that same day did you obtain a search warrant for the drug store of Parnell Bowling?

"A I did.

"Q Did you obtain it on the basis of that information?

"A I did.

"Q You also obtained one for a building—

"MR. WEINTRAUB: If Your Honor please, again I want to object to that. I want to object because I introduced the affidavit for the search warrant that was issued for the drug store and the empty building and that speaks for itself, if Your Honor pleas.

"MR. BROOKS: I assume that you did. It has already been shown that you did.

"A Yes, sir.

"Q Now, when you obtained these search warrants, did you obtain these warrants on the basis of the information given you by W. A. Hennard?

"A I did."

Actually Lt. Scully proceeded to procure three search warrants — one for the Bowling drug store, one for the building into which the drug store was about to move, and one for Bowling's home. The affidavit and the warrant issued for the home recited as follows:

"AFFIDAVIT FOR SEARCH WARRANT

"Affiant, Richard Scully, being first duly cautioned and sworn states that the laws of the Commonwealth of Kentucky, which prohibit receiving and possessing stolen property are being violated by Parnell Bowling at his residence known and designated as Box 146 F, Johns Hill Road, Cold Spring, Kentucky, which consists of a one (1) story red wire cut brick building; that affiant's reasons for stating the laws are being violated are that affiant was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located in the residence described herein at the present time:

"1 Victor Adding Machine, Serial No. 1635-392

"1 IBM Electric Typewriter, Serial No. 1261503

"1 Underwood Electric Typewriter, Serial No. E-13-8753824

"1 IBM Electric Typewriter, Serial No. 1186204

"1 Royal manual typewriter, Serial No. 6409538

and other stolen property, are in the premises of the said Parnell Bowling and are being concealed in the premises occupied by the said Parnell Bowling, which said premises are more particularly described as follows:

"A one (1) story red wire cut brick building located at Box 146 F, Johns Hill Road, Cold Spring, Kentucky.

"Affiant further states that the conduct described herein which occurred in and on the premises de-

scribed herein are in violation of the laws of Kentucky and contrary to the peace and dignity of the Commonwealth of Kentucky.

"/s/ RICHARD SCULLY

"Subscribed and sworn to before me, Notary Public, this 2nd day of April, 1963.

"/s/ BETTE L. RIEDMATTER

"My Comm. expires: 3/14/64

"A. J. JOLLY, Judge"

"SEARCH WARRANT

"COMMONWEALTH OF KENTUCKY

"To the Chief of Police of the County Police or to the Sheriff of Campbell County, Kentucky, or his Deputies or any other Campbell County Officer:

"Affiant, Richard Scully, having filed with me an affidavit stating that the laws of the Commonwealth of Kentucky which prohibit receiving and possessing stolen property is being violated by Parnell Bowling in and about the premises known and described as his residence located Box 146 F, Johns Hill Road, Cold Spring, Kentucky and being described as a one (1) story red wire cut brick building.

"THEREFORE, you are ordered and directed to search the above described premises by day or night for the detection of and seizure of stolen articles mentioned in the affidavit hereto attached, and if admission be not given on demand, to force an entrance into said premises for the detection of and seizure of said stolen articles and arrest the keepers or others in charge of said premises and other law violators, and bring him and them before me to be dealt with according to law.

"Dated: April 2, 1963.

"Time: 4:30 P.M.

"/s/ A. J. JOLLY

Judge, Campbell County, Kentucky

"4-2-63

"Executed this warrant at 6:15 P.M. by searching above premises for articles believed stolen in Greater Cincinnati area.

"/s/ LT. G. ARNOLD"

With this warrant in their possession, Newport and Campbell County police went to defendant's home, arriving there at 6:15 p.m. on April 2, 1963. Lt. Scully arrived later:

"Q About what time did you go there?
"A About seven P.M.
"Q How long did you stay there?
"A Close to midnight.
"Q What were you doing there at that time?
"A Writing serial numbers of various items in the basement of his home.
"Q Can you estimate at this time the number of items there in the home?
"A Fifty.
"Q Fifty items. Did it take considerable time to find the serial numbers on some of this equipment?
"A Yes, sir.
"Q During the time that you were there were you engaged primarily, not entirely, in the recording and looking for these serial numbers?
"A Yes, sir.
"Q This equipment there, Lt. Scully, was this — bulky, taken together?
"A Yes, sir."

None of the machines were seized that night except for a two-way radio which one of the officers recognized as having been stolen from a construction company. But the serial numbers were checked overnight, and on discovering that numbers of them (including those on the two machines involved in this indictment) were on police lists of stolen equipment, Newport and Campbell County police

officers returned with a truck the next morning and seized and removed the material in the basement.

Lt. George Arnold, of the Newport Police, had entered a notation on the warrant indicating service at 6:15 p.m. on April 2 (see warrant above). Lt. Arnold also testified that he returned the warrant to court on April 10, 1963 — the date the case was set for.

On this record we have no hesitancy in agreeing with the District Judge as to those issues which were squarely presented to him and decided by him on the motion to suppress.

The affidavit on its face recited ample reason for the magistrate to issue the search warrant. And as we read the search warrant, it appears quite specific in relation to the place and object of the search. Cf. *Aquilar* v. *Texas, supra.*

The service of the warrant apears to have conformed to Kentucky law, and, although not made by federal officers, appears likewise to be in general conformity to Rule 41 of the Federal Rules of Criminal Procedure.

The point earnestly urged that the actual seizure of the morning of April 3 was not made under the warrant at all because it had been "returned" at 6:15 April 2 seems to us to be an obvious misconstruction of the word "return." There was evidence (and uncontradicted) from which the District Judge could have concluded that the warrant was "returned" April 10. And certainly the mere fact that the time of its first use was promptly noted thereon did not vitiate its powers as of the following morning.

The more formidable problem posed by this case, however, is one which apparently was never specifically raised before the District Judge.

On appeal by brief and argument, appellant contends through his counsel that erroneous representations in the

affidavit were knowingly, falsely and fraudulently made by Lt. Scully and that this fraud was so material as to destroy the integrity of the affidavit (Cf. *Rugendorf* v. *United States,* 376 U.S. 528, 532 (1964)) and "vitiate the warrant and the search." (Cf. *King* v. *United States,* 282 F.2d 398 (C.A. 4, 1960)).

This record shows that there were erroneous representations made in the affidavit upon which the search warrant for the house was issued. But the contention that these errors were of such magnitude and based on such a fraudulent purpose as to vitiate the warrant was never presented to the District Judge either by the motion to suppress or the amendment thereto, or at the hearing thereon, or for that matter, on motion for new trial after conviction. And, of course, since the charge of intent to deceive the issuing magistrate was not made, the record is barren of any answers which the charge might have produced.

Generally, we do not reverse on issues not shown to have been specifically presented to the court below. *United States* v. *Doelker,* 327 F.2d 343 (C.A. 6, 1964); *Holt* v. *United States,* 303 F.2d 791, 794 (C.A. 8, 1962), *cert. denied,* 372 U.S. 970 (1963). And while we are aware of the "plain error" rule, Rule 52(b) Fed. R. Crim. P.,[1] we believe its application under the circumstances of this case is discretionary. *Gendron* v. *United States,* 295 F.2d 897, 902 (C.A. 8, 1961); *United States* v. *Sferas,* 210 F.2d 69 (C.A. 7, 1954), *cert. denied,* 347 U.S. 935 (1954); *United States* v. *Diggs,* 304 F.2d 929 (C.A. 6, 1962).

While we have noted that the intent to deceive the magistrate charge was never presented to the District

---

[1] Rule 52(b) Federal Rules of Criminal Procedure. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Judge, he did have clearly before him the factual errors in the affidavit upon which appellant now relies. Under this circumstance, we read the denial of the motion to suppress evidence as a holding that there was probable cause for the warrant and that errors in the affidavit were either immaterial or unintentional,[2] such as are produced by drafting "by non-lawyers in the midst and haste of a criminal investigation." *United States* v. *Ventresca, supra* at 108.

We find no reversible error.

Affirmed.

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[2] Generally, where probable cause to issue the warrant has been found, the courts have not looked favorably on attacks on search warrants which are based on claims of falsity in the statements of the affidavit. *United States* v. *Ramirez*, 279 F.2d 712 (C.A. 2, 1960), *cert. denied*, 364 U.S. 850 (1960); *United States* v. *McKay*, 2 F.2d 257 (D.C. Nev., 1924); *United States* v. *Evans*, 97 F. Supp. 95 (E.D. Tenn., 1951); *United States* v. *Doe*, 19 F.R.D. 1 (E.D. Tenn., 1956); *United States* v. *Brunett*, 53 F.2d 219 (W.D. Mo., 1931); Annot., 5 A.L.R.2d 394 (1949); *Cf. King* v. *United States*, 282 F.2d 398 (C.A. 4, 1960); *United States* v. *Henderson*, 17 F.R.D. 1 (D.C. D.C., 1954); *United States* v. *Bell*, 17 F.R.D. 13 (D.C. D.C., 1955), *aff'd. sub nom. Woods* v. *United States*, 240 F.2d 37 (C.A. D.C., 1956), *cert. denied*, 353 U.S. 941 (1957); *United States* v. *Nagle*, 34 F.2d 952 (N.D. N.Y., 1929); *Atlanta Enterprises* v. *Crawford*, 22 F.2d 834 (N.D. Ga., 1927).

Dealing squarely with such a claim of falsity in an affidavit, the Supreme Court of the United States said:

> "Petitioner attacks the validity of the search warrant. This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause'; . . ." *Rugendorf* v. *United States*, 376 U.S. 528, 531-32.

The facts in our instant case do not lend themselves to a present expression on this controversy.

APPENDIX C

(CAPTION OMITTED)

BEFORE: PHILLIPS and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT

(Filed September 29, 1965.)

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
Carl W. Reuss
Clerk

APPENDIX D

(CAPTION OMITTED)

ORDER SUR PETITION FOR REHEARING

(Filed November 3, 1965.)

Before: PHILLIPS and EDWARDS, Circuit Judges, CECIL, Senior Circuit Judge.

Defendant-appellant's petition for rehearing having been received and considered by the Court, the same is hereby denied.

Entered by order of the Court
Carl W. Reuss
Clerk

APPENDIX E

AFFIDAVIT FOR SEARCH WARRANT

Affiant, Richard Scully, being first duly cautioned and sworn states that the laws of the Commonwealth of Kentucky, which prohibit receiving and possessing stolen property are being violated by Parnell Bowling at his residence known and designated as Box 146 F, Johns Hill Road, Cold Spring, Kentucky, which consists of a one (1) story red wire cut brick building; that affiant's reasons for stating the laws are being violated are that affiant was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located in the residence described herein at the present time:

1 Victor Adding Machine, Serial No. 1635-392

1 IBM Electric Typewriter, Serial No. 1261503

1 Underwood Electric Typewriter, Serial No. E-13-8753824

1 IBM Electric Typewriter, Serial No. 1186204

1 Royal manual typewriter, Serial No. 6409538

and other stolen property, are in the premises of the said Parnell Bowling and are being concealed in the premises occupied by the said Parnell Bowling, which said premises are more particularly described as follows:

A one (1) story red wire cut brick building located at Box 146 F, Johns Hill Road, Cold Spring, Kentucky.

Affiant further states that the conduct described herein which occurred in and on the premises described herein

are in violation of the laws of Kentucky and contrary to the peace and dignity of the Commonwealth of Kentucky.

/s/ RICHARD SCULLY

Subscribed and sworn to before me, Notary Public, this 2nd day of April, 1963.

/s/ BETTE L. RIEDMATTER

My comm. expires: 3/14/64

A. J. JOLLY Judge

SEARCH WARRANT

COMMONWEALTH OF KENTUCKY

To the Chief of Police of the County Police or to the Sheriff of Campbell County, Kentucky, or his Deputies or any other Campbell County Officer:

Affiant, Richard Scully, having filed with me an affidavit stating that the laws of the Commonwealth of Kentucky which prohibit receiving and possessing stolen property is being violated by Parnell Bowling in and about the premises known and described as his residence located Box 146 F, Johns Hill Road, Cold Spring, Kentucky and being described as a one (1) story red wire cut brick building.

THEREFORE, you are ordered and directed to search the above described premises by day or night for the detection of and seizure of stolen articles mentioned in the affidavit hereto attached, and if admission be not given on demand, to force an entrance into said premises for the detection of and seizure of said stolen articles and arrest the keepers or others in charge of said premises and other law violators, and bring him and them before me to be dealt with according to law.

Dated: April 2, 1963.

Time: 4:30 P.M.

/s/ A. J. JOLLY
Judge, Campbell County, Kentucky

4-2-63.

Executed this warrant at 6:15 P.M. by searching above premises for articles believed stolen in Greater Cincinnati area.

/s/ Lt. G. ARNOLD

MOTION TO SUPPRESS EVIDENCE

(Filed September 23, 1963, in the United States District Court, Eastern District of Kentucky.)

Comes now the defendant, Parnell Bowling, and states that he is a person aggrieved under Rule 41 (e) of the Rules of Criminal Procedure, and moves the Court to suppress for use as evidence any and all property, evidence and information, and particularly the statements, information, property and evidence, including, but not limited to, 1 Friden Calculator, No. SW 8719661, and 1 Victor Adding Machine, Serial No. 1877376, for the following reasons:

1. That said property, evidence and information were unlawfully and illegally obtained in violation of the rights of the defendant and in violation of:

(a) Section 10 of the Constitution of Kentucky; of Rule 13.10 of the Rules of Criminal Procedure of Kentucky; and of the decisions of the Court of Appeals of Kentucky relating to unlawful and unreasonable search and seizure; and

(b) The Fourth and Fourteenth Amendments to the Constitution of the United States of America; Rule 41 of the Rules of Criminal Procedure governing the procedure in the Courts of the United States; and the decisions in Elkins v. U. S., 364 U.S. 206, 4 L. Ed. 2d 1669, 30 S. Ct. 1437; and in Ries v. U. S., 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431;

in that same were unlawfully and illegally obtained, taken and seized by the City of Newport, Kentucky, and/or Campbell County, Kentucky police officers without right and by unlawful and unreasonable searches and seizures of the home and premises of this defendant, and then after so obtained, taken and seized, the said officers furnished and turned over to the federal government, its agents and

officials, and particularly to the Federal Bureau of Investigation, the said statements, information, property and evidence so unlawfully and illegally obtained, and which is now, and at any other time or times or place or places, or at any trial or hearing whatsoever, inadmissible — Rule 41 (e).

2. That information obtained by the aforesaid officers on April 2, 1963 as a result of a search of the home and residence of the defendant pursuant to a purported affidavit for search warrant and a search warrant, issued at 4:30 P.M. on said date by Hon. A. J. Jolly, Judge, Campbell County Court, Newport, Kentucky, was:

(a) Illegal, null and void, as set forth in paragraph 1, above;

(b) That the affidavit for search warrant, and the search warrant were made and issued without basis of fact, and solely as a "fishing expedition" and as "a flyer";

(c) If not illegal, null and void, as a matter of law, then same was ineffectual, to sustain the search and seizure made by state officers at the home and residence of the defendant on April 3, 1963, because the search warrant had been fully and completely executed at 6:15 P.M. on said date of April 2, 1963, and the following return made thereon:

"4-2-63
Executed this warrant at 6:15 P.M. by searching above premises for articles believed stolen in Greater Cincinnati area.

(s) Lt. G. Arnold"

(d) That no goods or property were taken or seized under said alleged search warrant.

(e) That the said affidavit for a search warrant was insufficient to sustain the issuance of a search warrant

in that it did not state grounds or probable cause, was based upon suspicion and surmise, and did not state an offense or violation of the laws of Kentucky, and particularly K.R.S. 433.290, which has as the element of receiving stolen property the fact that it must have been received "knowing it to be stolen."

(f) That the said warrant issued pursuant to said affidavit for search warrant was illegal, null and void in that (1) it did not identify the property to be seized; (2) was insufficient in and of itself as a legal, valid search warrant; (3) did not state grounds, or probable cause; and (4) was insufficient under either State or Federal law.

3. That the search and seizure of goods and property at the home and residence of the defendant at or about 11:00 A.M., April 3, 1963, was:

(a) Illegal, null and void, as set forth in paragraph 1, above;

(b) That the search warrant dated April 2, 1963 had been executed on said April 2, 1963, and was not effectual to sustain a search and seizure on April 3, 1963;

(c) Made without an affidavit for a search warrant or a search warrant ever having been made or issued;

(d) That sufficient time had elapsed between the search of the home and residence at 6:15 P.M., April 2, 1963, and after the return made on said search warrant, for a search warrant to have been obtained in order to justify the entering of defendant's home and residence at or about 11:00 A.M., April 3, 1963, and seizing and taking goods and property therefrom by state officers, which was turned over to the federal authorities in the herein causes.

(e) That same was not made as an incident to a lawful arrest, in that the arrest of the defendant was made at or about 11:00 A.M., April 3, 1963, in Newport, Kentucky, and the home and residence of the defendant searched, and from which goods and property were taken, was approximately four (4) miles from the scene and place of the arrest; further, that the search of the defendant's home and residence, and the seizure and taking of goods and property therefrom had been planned and arranged for by state officers on the early morning of April 3, 1963, prior to the arrest of the defendant, and was commenced to be carried out prior to his arrest.

Defendant attached hereto and makes part hereof true and correct copies of the affidavit for search warrant signed by Richard Scully on April 2, 1963; the search warrant issued by A. J. Jolly, Judge, Campbell County Court, Campbell County, Kentucky, dated April 2, 1963, at 4:30 P.M., and which shows thereon the execution thereon on April 2, 1963, at 6:15 P.M.; the affidavit and warrant of arrest dated April 3, 1963, charging the defendant with possession of stolen property and which shows the execution thereof to be 11:00 A.M., April 3, 1963.

Defendant moves for leave to introduce further proof in support thereof.

/s/ MORRIS WEINTRAUB
321 York St.,
Newport, Kentucky
HE 1-6932
/s/ CHARLES J. SCHEAR
502 Finance Bldg.
Newport, Kentucky
CO 1-9021

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 837

PARNELL BOWLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 351 F. 2d 236.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1965. A petition for rehearing was denied on November 3, 1965. The petition for a writ of certiorari was filed on December 20, 1965, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

799-357—66

QUESTION PRESENTED

Whether stolen property seized pursuant to a search warrant was properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky petitioner was convicted on two counts of wilfully receiving and concealing two calculators belonging to the United States with intent to convert them to his own use in violation of 18 U.S.C. 641. He was sentenced to concurrent terms of imprisonment for one year and one day (A. 12).[1]

The evidence that petitioner had in his possession two business machines which had been stolen from the United States was undisputed. The only factual issues were raised on a motion to suppress the machines as evidence, which was overruled before the trial (A. 12). Testimony at the hearing on the motion revealed that Richard Scully, a Cincinnati police detective, was investigating the theft of an IBM machine from IBM in Cincinnati. On Scully's instructions, the IBM company reported to him when someone called them for the part known to be missing from the stolen machine (A. 18–20, 27–28). Through this method Scully traced the stolen machine to Wesley Hennard in Newport, Kentucky.[2] Hennard at first claimed that he had purchased

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[1] "A." refers to petitioner's appendix in the court of appeals, which is on file with the Clerk of this Court.

[2] Newport, although in Kentucky, is directly across the Ohio River from Cincinnati and is included within Metropolitan Cincinnati.

the machines from a man named "Jake" who drove an old car (A. 19, 27), but thereafter told the officer that he had bought two machines [2] and much more equipment from petitioner (A. 29, 30). Hennard then told Scully that he had seen other business machines on the prescription shelf in the back of petitioner's drug store (A. 30–31).

On April 2, 1963, Scully, on the basis of this information, submitted an affidavit alleging that he was informed by Hennard that five business machines, which he identified by serial number, and other stolen property were in petitioner's possession in his residence (A. 31). Scully also filed affidavits for searches of petitioner's drug store and a building across the street which petitioner owned (A. 26, 27, 72–75). Search warrants were issued that afternoon (Pet. App. E, 17a–19a).

The search was conducted at 6:15 that night by Scully and several local officers. For the next five hours the police recorded serial numbers of some fifty items in the basement of petitioner's home (A. 54a) including the two business machines stolen from the government, other business machines, and hi-fidelity and sporting equipment (A. 34, 63–64). The next day, after determining from the serial numbers that many of the items had been reported stolen, police officers came with a moving van and picked up the stolen goods (A. 46–48).

On April 10, 1963, the warrant was returned to the court with a list of the articles seized. It contained a

[2] Scully had observed a second stolen machine while interviewing Hennard.

notation apparently made at 6:15 p.m. on April 2, 1963, which stated that it had been executed (A. 65–67).

ARGUMENT

The petition for a writ of certiorari is out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason for further review.

1. Petitioner argues that the affidavit for the search warrant was falsely made by officer Scully (Pet. 7–15). While it is true that the affidavit was inaccurate insofar as it stated that the informant had identified particular machines and had seen them at petitioner's home, the court below properly concluded that the "contention that these errors were of such magnitude and based on such a fraudulent purpose as to vitiate the warrant was never presented to the District Judge * * *" either by motion to suppress or by motion for a new trial (Pet. App. B, 13a). The failure to particularize this objection made it impossible for the trial judge to make essential factual determinations. The hearing on the motion to suppress did not reveal whether the issuing magistrate was orally told that two other search warrants had been or were going to be obtained;[4] whether the searches of the other two premises were completed before or after the warrant issued; and whether the issuing magistrate was made aware of exactly what the informer had told the affiant. Under these circumstances, the failure to object with specificity makes this issue unavailable on

[4] The affidavit for the search of petitioner's residence was presented to a county magistrate rather than to a city police court judge—as were the other two affidavits—because the residence was outside city limits.

appeal. See *On Lee* v. *United States*, 343 U.S. 747, 749–750, n. 3; *United States* v. *Brown*, 348 F. 2d 661 (C.A. 2), certiorari denied, 381 U.S. 904; *Lawson* v. *United States*, 248 F. 2d 654 (C.A.D.C.), certiorari denied, 355 U.S. 963; *United States* v. *Ladson*, 294 F. 2d 535, 538–539 (C.A. 2), certiorari denied, 369 U.S. 824.

Petitioner argues that he raised this issue by claiming that the affidavit was issued as a "fishing expedition" (Pet. 8, 9). But that claim did not challenge specific allegations; it rested on the premise that the officer had no reason to suspect petitioner, and the record made at the hearing adequately refuted that claim. Moreover, petitioner objected when the government attempted to interrogate the affiant on his good faith (A. 32). Government counsel asserted that there were two separate issues—whether the affidavit was valid on its face and whether there was a basis for obtaining a warrant in the first place—and the court then ruled, without further comment from petitioner, that any question as to the officer's intent was irrelevant. If petitioner wished to suggest that the warrant had been obtained by fraud, this was a clear opportunity to explore that issue (A. 32–33).

2. In any event, the officer had adequate probable cause for the issuance of the warrant. Two pieces of stolen property in the informant's possession had been positively identified, and the informant stated that petitioner sold and had many other items at his drugstore. The officer could reasonably conclude that petitioner was a receiver of stolen business property. Since such goods can easily be moved from place to

place, the information constituted probable cause to search petitioner's residence as well as his place of business.

3. It is fundamental that a supporting affidavit must be read together with the search warrant. When this course is followed, petitioner's argument (Pet. 21–25) that the warrant did not state the grounds or probable cause for issuance and that it did not identify the objects to be seized is spurious. This challenge to the warrant is the type of highly technical attack discouraged by this Court in *United States* v. *Ventresca*, 380 U.S. 102.

4. Petitioner's argument that the warrant was not valid at the time of the seizure because of the notation that it had been executed at 6:15 p.m. on April 2, 1963 is without merit (Pet. 25–26). Extensive search and recording *began* on April 2 but the search continued until 11:30 that night and culminated with the seizure of the stolen property on the next day. No legal principle governing search warrants has been cited by petitioner to support the novel proposition that the officer's notation effectively spent the force of the warrant. The warrant was *returned* to the issuing court with a list of the property seized on April 10, 1963, not on April 2, 1963.

5. Petitioner's final contention is that the search was invalid under State law and that this circumstance should render the evidence inadmissible in a federal court (Pet. 26–33). Recognizing that this contention conflicts with *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253, petitioner contends that those decisions should be re-

examined. We submit that there is no basis for such re-evaluation. The rule suggested by petitioner would make the admissibility of evidence in federal criminal cases depend on vagaries of State law—a result inconsistent with Rule 26 of the Federal Rules of Criminal Procedure, which obviously contemplated uniform rules of evidence in all federal criminal proceedings. Compare Rule 43(a), Federal Rules of Civil Procedure, which provides for the admissibility of all evidence which is admissible "in the courts of general jurisdiction of the state in which the United States court is held."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
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JANUARY 1966.

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No. 837

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

PARNELL BOWLING,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF OF PETITIONER

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PARNELL BOWLING,

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

Government's brief in opposition to petition for a writ of certiorari is, in the main, directed to two points:

1) That the petition is out of time under Rule 22(2) of this Court;

2) That the falsity of the affidavit upon which the search warrant was issued, which falsity is admitted by the government, was not raised by petitioner at the trial, and, therefore, petitioner is entitled to no relief.

The government's opposition brief touches upon other issues raised in the petition for a writ, but developed nothing to counter the arguments of petitioner on these other points. Hence, petitioner does not reply to such other matters, relying upon his petition.

The two points will be argued in inverse order in this reply brief.

ARGUMENT

The Government in its opposition brief was content, as was the Sixth Circuit Court of Appeals, to deny petitioner substantial, constitutional rights on the narrow proposition that the issue of the falsity of the affidavit for a search warrant was not made an issue in the trial Court, although admitting "that the affidavit was inaccurate" (p. 4, Gov't brief).

Petitioner is taken aback at the Government's contention that the petition for a writ of certiorari should be denied because:

1. On the hearing on the motion to suppress, no testimony was elicited concerning *oral statements that may have been made to the issuing magistrate* (p. 4, Gov't brief);

2. The record does not state whether the searches of two other premises were completed before or after the warrant issued (p. 4, Gov't brief):[1]

3. The record does not reveal whether the issuing magistrate "was made aware of exactly what the informer had told the affiant" (p. 4, Gov't brief).

The Government's argument on each of these matters is irrelevant and contrary to the long history of the law of search and seizure that the affidavit must embody in it all the facts necessary for a magistrate to issue a search warrant. *Aguilar* v. *Texas,* 378 U.S. 109; *Jones* v. *U. S.,* 362 U.S. 257. *What the affiant may or may not have told the magistrate is not what counts.*

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[1] The record shows that these two searches were based on warrants issued by another magistrate, the Judge of the City of Newport, Kentucky Police Court, but they produced nothing. The Court of Appeals in its opinion said "the searchers drew blanks", further evidence that the entire procedure was a "fishing expedition" and taken as "a flyer" as set forth in the motion to suppress, and admitted to be so by affiant Scully (p. 10, Petition; pp. 20a-21a, Appendix on file with the Clerk of this Court).

On page 5 of its brief, the Government would again deny petitioner substantial, constitutional rights on the theory that "petitioner objected when the government attempted to interrogate the affiant on his "good faith", referring to page 32a (A. 32) of petitioner's appendix on file with the Clerk of this Court. The record does not support the government's statement. "Good faith" of affiant Scully was not then an issue; Scully had already admitted that the substantial untruths he put in the affidavit were not told him by the informant. It was when the Government sought to inject the *belief* of the affiant, and sought to include the "home of Parnell Bowling", when the questioning had been concerning two other places — the drug store and a store under construction across from the drug store, that petitioner objected. It was the trial judge (32a) that said "what he (Scully) believed or what he knew or what he thought he knew or what he had information about, all of that must be reflected in the affidavit of the search warrant."

The Government further argues that petitioner's motion to suppress did not "particularize" the objections asserted by petitioner, and "did not challenge specific allegations" (pp. 4-5, Gov't brief). Petitioner in his motion to suppress gave as one of the grounds that the affidavit for the search warrant was made *"without basis in fact"*. This was a direct attack at the very heart of the affidavit which stated "affiant's reasons" for asking the magistrate to issue a search warrant, and the falsity of which reasons the Government admitted, saying on page 4 of its brief that "it is true that the affidavit was inaccurate insofar as it stated that the informant had identified particular machines and had seen them at petitioner's home . . ." This statement in the affidavit was the very heart and guts of the affidavit. Without it no search warrant could have issued to search peti-

tioner's home. And when the motion to suppress set up the issue that the affidavit was made *"without basis in fact"*, it had only one plain, logical meaning — the affidavit was NOT TRUE, in other words, it was false. So that the issue was raised in the trial court, notwithstanding the Government's subtle attempt to side-track or minimize it by substituting the word "inaccurate" for false. It was this very issue of placing a known, deliberate false statement in the affidavit by the affiant, which the Court of Appeals called "the more formidable problem posed by this case", but which it refused to decide. And the Government would have this Court dodge it also!

Eliminating all the semantics by the Government which, on the one hand, claims to deplore the use of "highly technical attacks", yet it is the Government itself which would have this Court uphold the Sixth Circuit's use of a "highly technical" reason for failure to rule on the merits of the issue, which it should have done by invoking the "plain error" rule. Rule 52(b), Fed. R. Crim. Proc.

The Government next contends (p. 5, Gov't brief) that because "two pieces of stolen property in the informant's possession had been positively identified, and that informant stated that petitioner sold and had many other items at his drugstore", that, therefore, affiant (Scully) "could reasonably conclude that petitioner was a receiver of stolen business property". The Government then goes from this false major premise to argue that "this information constituted probable cause to search petitioner's residence as well as his place of business" (p. 6, Gov't brief). Neither the premise nor the conclusion is correct.

What the affiant (Scully) may or may not conclude is not the test for determining the sufficiency of an affidavit for a search warrant. The subjective conclusions are not only

irrelevant, but, we submit, had his conclusion been put in the affidavit itself for a magistrate to evaluate and judge, the affidavit still would not have been valid, because an affidavit based upon conclusions is a nullity. *Aguilar* and *Jones, supra.*

In the overall picture of this case lies the uncontroverted fact that affiant Scully knowingly gave a false affidavit by which means he secured a search warrant. The real issue is whether this Court will tolerate the doing by indirection and falsity what could not have been done directly and by truth. To permit such deception and use of falsity, places in the hands of an over-zealous officer the power to do away with "probable cause". We submit it was the honest, conscientious officer of the law, working in haste, this Court sought to protect by the *Ventresca* case, so that his work would not be undone by "highly technical attacks". It did not intend, we believe, to place in the hands of an officer of the law, the power to deliberately use known falsity as a means of depriving a person of his rights under the Fourth Amendment and under Rule 41(c), Rules of Criminal Procedure.

CIRCUMSTANCES IN THIS CASE CALL FOR THE WAIVER BY THIS COURT OF ITS THIRTY DAY FILING RULE, AND CONSIDERATION BY IT OF THE PETITION ON THE MERITS.

The Government states that the filing of the petition for a writ of certiorari is out of time under Rule 22(2) of the Rules of this Court, inferring that this is jurisdictional, and, therefore, the petition should not be considered on its merits.

We urge the Court to consider the petition on its merits not only because of the important issues raised, but because

there is ample reason in this case for this Court to waive its rule, based upon the unusual and unique circumstances which brought about the filing of the petition beyond the thirty days after the order of the Sixth Circuit denying the petition for a rehearing.

The necessity for filing a petition for a writ of certiorari in a criminal case within thirty days is not statutory, as it is under 28 U.S.C. 2101, which provides for a ninety day period in civil cases. The thirty day filing is a rule of this Court. As such, it should, under proper and just circumstances, and in order to promote justice, be waived. Moreover, Rule 22(2) itself provides that for good cause the time for applying for a writ of certiorari may be extended for a period not exceeding thirty days. The petition in this case was filed within this "extended" thirty day period.

The "good cause" relied upon by petitioner is: Attorneys Weintraub and Schear, who tried the case in the District Court, and who briefed and argued the case in the Sixth Circuit Court of Appeals were not admitted to the Supreme Court. Request was made of Attorney Thomas D. Hirschfeld, of Newport, Kentucky, who was admitted to practice in this Court, to associate himself with Attorneys Weintraub and Schear in seeking a writ of certiorari. Attorney Hirschfeld agreed, with the stipulation that any petition or brief prepared by Weintraub or Schear would first be presented to him before being filed. The petition for a writ of certiorari was prepared by Weintraub and Schear well within the thirty days after the denial by the Sixth Circuit of the petition for a rehearing, and in sufficient time for it to have been filed in this Court within the thirty days.

Upon the denial of the petition for a rehearing, a motion was filed in the Sixth Circuit Court of Appeals for a stay of

the mandate. On November 26, 1965, the Office of the Clerk, United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio, sent the following letter to Attorneys Weintraub and Schear:

Carl W. Reuss
Clerk

16,226

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
Cincinnati, Ohio 45202

November 26, 1965

Mr. Morris Weintraub
321 York St.
Newport, Ky.
Mr. Charles J. Schear
502 Finance Bldg.
Newport, Ky.

Re: United States of America
vs. Parnell Bowling
No. 16,226

Gentlemen:

Please be advised that an order was entered today, staying the issuance of mandate in this case for thirty (30) days from this date, provided that the petition for writ of certiorari is filed in the Supreme Court within such thirty day period.

I call your attention to the fact that the order staying the mandate does not extend the time for filing the petition for certiorari. That time is fixed by statute. See 28 U.S.C. § 2101.

Yours very truly

Carl W. Reuss, Clerk
(Signed) Helen Toohey, Deputy Clerk

cc: Hon. George I. Cline
United States Attorney
Federal Bldg., Lexington, Ky.

A photo copy of the letter is attached as an Appendix to this reply brief.

Two things are significant: Paragraph one of the letter gave the impression that petitioner had *within* 30 days after the date of the letter, November 26, 1965, the date the mandate was stayed, to file a petition for a writ of certiorari; this would give up to December 26, 1965. Paragraph two of the Clerk's letter advised that 28 U.S.C. § 2101 governed the time for filing a petition for a writ of certiorari; Section 2101 allows for a ninety day filing period.

Counsel for petitioner, in good faith, took the letter from the Clerk to mean that a petition for a writ could be filed up to December 26, 1965, being "within such thirty day period" referred to in paragraph one. Furthermore, counsel fell into the same error as did the Office of the Clerk of the United States Court of Appeals for the Sixth Circuit, in not noting that the ninety day filing period of Section 2101 applied to civil actions, and not to criminal matters!

Compounding this series of events, was the fact that Attorney Hirschfeld was then confined to a hospital. Not wishing to unnecessarily burden or disturb Mr. Hirschfeld at the hospital with this one matter, and being under the honest belief that additional time was still available, the brief was not submitted to Mr. Hirschfeld until a later date, at which time other matters relating to other cases were discussed with him. Mr. Hirschfeld approved the petition for a writ of certiorari, and it was filed on December 20, 1965. On January 14, 1966, Mr. Hirschfeld died!

It is most respectfully submitted that the thirty day filing period under Rule 22(2) should be waived by this Court in this case; or, in the alternative, that the facts and circumstances are such that the "good cause shown" provided for

in Rule 22(2) for extending the filing for an additional thirty days did then exist, and that the filing on December 20, 1965 was within the rule.

CONCLUSION

Petitioner respectfully submits that this Court consider the petition for a writ of certiorari as not being improperly filed out of time, and that the writ be granted.

MORRIS WEINTRAUB
321 York Street
Newport, Kentucky 41071
CHARLES J. SCHEAR
Finance Building
Newport, Kentucky 41071
OF COUNSEL
FOR PETITIONER

January 24, 1966

CERTIFICATE

Morris Weintraub and Charles J. Schear hereby certify that this reply brief is filed in good faith, and that the statements of fact contained in that portion of the argument relating to the contention of the Government that the petition was filed out of time are true and correct.

MORRIS WEINTRAUB

CHARLES J. SCHEAR

January 24, 1966

16,226

OFFICE OF THE CLERK

CARL W. REUSS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

November 26, 1965

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Newport, Ky.

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Yours very truly

Carl W. Reuss, Clerk

Helen Toohey

HT

Deputy Clerk

cc: Hon. George I. Cline
United States Attorney
Federal Bldg., Lexington Ky

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MAR 16 1966
JOHN F. DAVIS, CLERK

No. 837

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

PARNELL BOWLING,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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PETITION FOR REHEARING

Now comes PARNELL BOWLING, Petitioner, and respectfully prays the Court to grant a rehearing, and to reconsider its order denying the Petition for a Writ of Certiorari.

Petitioner's home in Cold Spring, Kentucky was searched pursuant to a search warrant issued by the County Judge of Campbell County, Kentucky, on an affidavit made by a detective from the Cincinnati, Ohio police department. All the material allegations which had any material relevancy to the issuance of the search warrant were knowingly, falsely and fraudulently made by this detective.

Federal officers did not participate in the search or seizure. They had nothing to do with it, and knew nothing of it. The two business machines described in the indictment were turned over to the federal authorities by the state officers on a "silver platter".

A motion to suppress evidence was timely filed. Evidence was presented. It was overruled (4a-11a, 12a).

In his petition for a writ of certiorari, petitioner raised the question of admissibility of the evidence seized under a search warrant issued pursuant to an affidavit based upon statements knowingly, falsely and fraudulently made in order to obtain a search warrant, without which statements the search warrant could not issue. The Court of Appeals for the Sixth Circuit decided this issue on the narrow proposition that petitioner had not "specifically presented" it to the trial Court. This Court refused to grant certiorari on this issue, as well as the other issues raised in the Petition that the affidavit for a search warrant did not state sufficient facts to establish probable cause, nor did the search warrant sufficiently describe and identify the property to be seized.

This Petition for Rehearing now brings before this Court the proposition that the search warrant was executed in an unreasonable manner. This issue was presented in petitioner's brief in the Sixth Circuit. The Sixth Circuit did not pass upon it. It was a substantial ground available to petitioner although not previously presented to this Court in his petition for a writ of certiorari. Rule 58.

Petitioner contends that unauthorized and unnecessary persons invited by the Campbell County, Kentucky police to search and seize property at petitioner's home, tainted the evidence obtained and made the search and seizure unreasonable under the Fourth Amendment.

The search warrant (9a) was directed "To the Chief of Police of the County Police or to the Sheriff of Campbell County, Kentucky, or his Deputies or any other Campbell County Officer."

On April 2, 1963, two Campbell County Police brought into petitioner's home in Cold Spring, Kentucky, two City

of Cincinnati, Ohio detectives, and detectives from the City of Newport, Kentucky (36a, 39a, 40a).

On April 3, 1963, two City of Newport detectives and two Newport jail prisoners went into petitioner's home in Cold Spring, Kentucky, and began removing articles *before* any Campbell County police officer had arrived on the scene (58a, 59a). These unauthorized persons actually dominated and controlled the search and seizure in petitioner's home. The two Cincinnati, Ohio detectives searched the basement, taking down serial numbers on articles (36a, 40a, 41a, 42a). City of Newport, Kentucky detectives hired a moving van (47a) to remove the articles from petitioner's home.

The only authorized authorities under the search warrant were the "Chief of Police of the County Police, or the Sheriff of Campbell County, Kentucky, or his Deputies or any other Campbell County officer." The record, however, shows that the seizure was made by Cincinnati, Ohio detectives, City of Newport detectives, and two jail prisoners.

City of Newport, Kentucky police officers did not fall within the category of persons directed by the search warrant to search and seize at petitioner's home. Moreover, petitioner's home was located in Cold Spring, Kentucky, which is outside the municipal limits of the City of Newport, Kentucky. City of Newport officers have no jurisdiction outside the limits of the City of Newport. *Brittain* v. *U. S. F. & G.*, 293 SW 956, 219 Ky 465. Without question, City of Cincinnati, Ohio detectives, and two jail prisoners from the City of Newport, Kentucky jail, had no authority to be in the home of petitioner.

Petitioner recognizes that police authorized to make a search may take along persons for the purpose of identifying property for which a search warrant was issued. *Romeror* v. *Squier,* 133 F.2d 528. In this case the serial

PETITION FOR REHEARING

numbers of business machines were listed in the affidavit for a search warrant (8a), and there was no valid or cogent reason for Cincinnati, Ohio or Newport, Kentucky police to be there.

The right to conduct a reasonable search and seizure does not carry with it a right to invade a home with an army of unauthorized persons, nor does it contemplate that petitioner must suffer the indignity of having two prisoners from another city remove property therefrom. Such tactics are calculated to produce fear, not justice. They reek with the odor of a totalitarian police state. It is repugnant to the Fourth Amendment.

CONCLUSION

This Petition for Rehearing should be granted, and the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

MORRIS WEINTRAUB
321 York Street
Newport, Kentucky
CHARLES J. SCHEAR
Finance Building
Newport, Kentucky
Of Counsel for Petitioner

CERTIFICATE OF COUNSEL

We certify that this Petition for Rehearing is presented in good faith and not for delay, and that the ground set forth is restricted to the grounds set forth in Rule 58.

MORRIS WEINTRAUB
CHARLES J. SCHEAR